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October 5, 2007

The Honorable Benjamin H. Settle
United States District Judge
United States District Court for the
Western District of Washington
1717 Pacific Avenue
Tacoma, Washington 98402-3234

Re: 1LT Ehren Watada v. John M. Head, et al.
No. C07-5549BHS, USDC, W.D. Washington

Dear Judge Settle:

At your request that I provide authorities to you regarding the unavailability of habeas corpus jurisdiction in the narrow circumstances in which the relief sought would not result in discharge of the plaintiff from the military, we came across the cases of *Glazier v. Hackel*, 440 F.2d 592 (9th Cir. 1971) and *Bratcher v. McNamara*, 448 F.2d 222 (9th Cir. 1971), which are cases in which habeas corpus jurisdiction was found to exist where release from custody is not available. In light of the discovery of these cases, we ask that we be allowed to withdraw this argument for purposes of the TRO application.

Defendants continue to believe, however, that the principles of comity apply with particular force in this case because the cases where federal courts have exercised habeas corpus jurisdiction in military cases are limited to conscientious objector cases, Soldiers seeking release from custody, persons attempting to block their induction into the military, or collateral attacks to courts-martial following conviction and exhaustion of military appellate remedies. The government is aware of no cases where the federal courts have intervened in a pending court-martial where they were unable to affect the release of the petitioner. Such intervention is particularly inappropriate where, as here, the petitioner has been afforded full and fair consideration of his claims by the trial and appellate courts. "Court inquiry is limited to whether the court-martial had jurisdiction of the person and the offense charged, whether the accused was accorded due process of law as contemplated and assured by the Uniform Code of Military Justice, and whether competent military tribunals gave fair and full consideration to the

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procedural safeguards deemed essential to a fair trial under military law." *Gorko v. Commanding Officer*, 314 F.2d 858, 859 (10th Cir. 1963).

I agree with plaintiff's counsel that I was mistaken in my assertion that the plaintiff has had an appeal "of right," but believe that this mistake makes no difference in the argument. Plaintiff was afforded discretionary review in the military courts of his double jeopardy claim which is the functional equivalent of an interlocutory appeal to the Court of Appeals in the Article III courts. As is true in a case before an Article III court, because the decision in his interlocutory appeal went against him, there is no reason that the court-martial cannot now proceed.

Thank you for your attention to this matter.

Yours truly,

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cc: James Lobsenz
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